SUPREME COURT, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-297

JACOB SCHAEFER,
Petitioner,
vs.
DANIEL LEONE, WARDEN,
HARTFORD, CONNECTICUT CORRECTIONAL CENTER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit, review of which is requested by this petition, was entered May 24, 1971 and is reported at 443 F.2d 182. The decision of the United States District Court, District of Connecticut, was filed November 12, 1969 and was not reported in the Federal Supplement.

QUESTION PRESENTED

Whether an alleged misstatement of law in a jury instruction delivered by a Connecticut trial court, which misstatement concerned the provable elements of the crime charged, and which was held to constitute non-reversible error by Con-

necticut appellate courts, posed a substantial federal question cognizable by a United States District Court under its habeas corpus jurisdiction.

STATEMENT OF CASE

Petitioner was convicted in the Connecticut Circuit Court on March 18, 1968 on a single count of pool selling in violation of Sec. 53-295 Conn. Gen. Stat. The conviction was predicated upon the admission of evidence which was seized from the possession of petitioner and which included documents identified as "tally sheets", a National Armstrong Daily, "lines", "point spreads" and "bookmakers' worksheets".

At the conclusion of the trial, petitioner raised several objections to the jury charge. Among these was an objection to one paragraph of the charge which instructed on the possession of "betting lines" or "odds" but did not repeat, specifically, the requirement of criminal intent.[1]

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[1] The three sentences in the trial court's charge to which petitioner objects read as follows:

> "The statute also prohibits one from having in his possession and under his control a betting line. It does not specifically say so, or odds upon football games as the possession of this line or odds as [is] *prohibited by that portion of the statute which prohibits one from being concerned in pool selling.* And if you find that the defendant did have such a line or lines or odds in his possession and under his control, you should find him guilty in this respect." (Emphasis added)

In the very next paragraph of the charge, the trial court properly instructed on the meaning (under Connecticut law) of *being concerned in pool selling.*

The Appellate Division of the Connecticut Circuit Court affirmed the conviction stating that the jury charge, when read in its entirety, satisfied the requirement of Connecticut law and sufficiently informed the jury of the elements of the crime.[2] On September 24, 1969, the Connecticut Supreme Court refused to certify the jury issue for appeal.[3]

On October 6, 1969, having exhausted his state remedies, petitioner applied to the United States District Court, District of Connecticut, at Hartford, for a writ of habeas corpus contending that the quoted portion of the charge violated his First, Fifth and Fourteenth Amendment rights. On November 12, 1969, the District Court granted the writ basing its federal question jurisdiction on a denial of due process under *Cole* vs. *Arkansas*, 333 U.S. 196 (1948). The District Court held that the rule of *Cole* was violated because the failure to repeat criminal intent requirements in the questioned paragraph of the charge resulted in petitioner being convicted of a non-existent crime.

On May 24, 1971, the Court of Appeals for the Second Circuit reversed holding that the District Court had lacked habeas jurisdiction because the issue did not present a substantial federal question. The Court of Appeals ruled that an interpretation of a Connecticut criminal statute regarding substantive elements, and the sufficiency of a jury charge thereunder, was a question within the exclusive province of the Connecticut courts and did not present a constitutional issue of due process.

On August 25, 1971, petitioner applied to this Court for a writ of certiorari.

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[2] *State* vs. *Schaefer*, 5 Conn. Cir. 669 (June 13, 1969).

[3] *State* vs. *Schaefer*, Vol. XXXI, No. 15, Conn. L.J. 9 (1969).

REASONS FOR DENYING THE WRIT

I.

There is no special or important reason for this Court to consider the issue ruled upon by the Court of Appeals. Neither the facts of this case nor the issue passed on by the Court of Appeals presents any special reason for further review. U.S. Sup. Ct. 19 (1) (b), 28 U.S.C.

Petitioner's suggestion that additional review is required where, as here, the Court of Appeals decision on a jurisdictional and/or constitutional issue is different from that of the District Court is untenable. If such were the standard, this Court would be required to grant the writ anytime a District Court decision was reversed by a Court of Appeals.

Similarly without merit is petitioner's contention that a denial of review by this Court will result in "hundreds of thousands of Connecticut residents" being subjected to criminal culpability for possession of publications reporting information on sporting events. The Connecticut policy and pool selling statutes have been construed repeatedly by Connecticut courts to be non-possessory and to prohibit only the substantive crime of buying or selling pools or being "concerned" therewith. *State* vs. *Fico*, 147 Conn. 426 (1960), *State* vs. *Pignone*, 1 Conn. Cir. 406 (1962).

II.

The Court of Appeals held that the three sentences of the jury charge which were objected to by petitioner did not present a question of due process under the principle of *Cole* vs. *Arkansas*, 333 U.S. 196 (1948). In so doing, that court ruled

the purpose of the *Cole* rule was to assure reasonable notice of the crime charged and an opportunity to be heard thereon.[4] By such ruling, the Court of Appeals merely restated a rule of constitutional law previously established and settled by this Court. *Paterno* vs. *Lyons*, 334 U.S. 314, 320 (1947); *In Re Oliver*, 333 U.S. 257 (1947).

III.

The Court of Appeals correctly applied existing and well settled law in stating that error in a state trial court's jury charge does not present a federal constitutional question reviewable by a District Court on a petition for a writ of habeas corpus. *Cryger* vs. *Burke*, 334 U.S. 728 (1948); *Gemmel* vs. *Buchkoe*, 358 F.2d 338 (6th Cir. 1966) *cert. denied* 385 U.S. 962 (1966); *Faust* vs. *State of North Carolina*, 307 F.2d 869 (4th Cir. 1962); *Grundler* vs. *State of North Carolina*, 283

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[4] If the doctrine of *Cole* were applied here, it must be concluded that one sentence in the state trial court's charge denied petitioner of notice of the crime charged and an opportunity to be heard thereon. Such conclusion is unwarranted. The very thrust of petitioner's defense was that the documents found in his possession were not used in connection with pool selling. The fact that the trial judge ambiguously stated the rule of "mere possession" (under Connecticut law) did not deprive petitioner of notice of the substantive offense charged, or of a full trial thereon followed by appellate review. Nothing in the Connecticut proceedings denied petitioner notice that he was charged with the crime of pool selling or deprived him of his "day in court" on that charge at either the trial or appellate level.

F.2d 798 (4th Cir. 1960); *Clark* vs. *Peyton*, 280 F. Supp. 205 (W.D. Va. 1968).

As the Court of Appeals noted, the District Court reviewed the state trial court's instruction regarding the provable elements of the crime on the authority of two cases: *Bollenbach* vs. *United States*, 326 U.S. 607 (1945) and *Morrissette* vs. *United States*, 342 U.S. 246 (1951). Both of these cases, however, involved federal prosecutions. Neither case is authority for a District Court's collateral examination of a state court's jury charge since, in each, this Court granted certiorari to review federal judges' jury charges in its supervisory role over federal courts and for the purpose of settling important and far reaching questions of federal law.

IV.

Petitioner's reliance on *Chapman* vs. *California* 386 U.S. 18 (1967) is misplaced. That case requires retrial where an error involving a denial of a federal constitutional right is not shown to be harmless beyond a reasonable doubt. But here, as the Court of Appeals ruled, the alleged error in the state court was *not* of constitutional dimension as it involved merely questions of Connecticut law. Since no issue of a federal right was involved, the rule of *Chapman* has no application.

V.

This case does not present any genuine First Amendment issue under *Stanley* vs. *Georgia*, 394 U.S. 557 (196)[5]. Connecticut courts have held (and respondent has conceded in all proceedings below) that the statute requires more than simply proof of possession. *State* vs. *Fico, supra; State* vs. *Pignone, supra.*

Here, the Connecticut appellate courts, in evaluating the adequacy of the trial court's instructions, properly reviewed the questioned paragraph in the context of the entire charge. *Johnson* vs. *Bennet*, 386 F.2d 677, 683-684 (8th Cir. 1967); *Farlow* vs. *Connecticut Company*, 147 Conn. 644, 648 (1960); *State* vs. *Johnson*, 139 Conn. 89, 93 (1952). The Connecticut courts ruled that the charge, when read in its entirety, properly and adequately apprised the jury of all the elements of the crime.[6] Thus, the holding of the Connecticut courts was that the complete charge informed the jury that the actual crime was the business of buying or selling pools or being concerned with such activity. The Court of Appeals ruled that the sufficiency of the charge on the provable elements of the crime was a question for the state courts. Since neither the Connecticut appellate decisions nor the decision of the Court

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[5] As stated, the District Court did not base its federal right jurisdiction on a First Amendment issue, but, rather on a question of due process under *Cole* vs. *Arkansas, supra.*

[6] In the case at bar, the Connecticut appellate courts did not reverse earlier decisions and rule that the statute created a possessory crime. If they had, then perhaps a bona fide *Stanley* issue might be present. *Kelly* vs. *Illinois Bell Telephone Company*, 210 F. Supp. 456 (N.D. Ill. 1962).

of Appeals treated pool selling under the Connecticut statute as a possessory crime, petitioner's First Amendment contentions are unfounded.

VI.

The Connecticut trial court instructed the jury that upon a finding of possession of "such a line . . . or odds, you should (not *must*) find him guilty in this respect (being concerned in pool selling)." The District Court held that this single sentence of the jury charge was so manifestly unfair as to amount to a denial of due process.

If the trial court had used the word "may" instead of "should", the sentence would have been a perfectly correct statement of Connecticut law. *State* vs. *Fico, supra; State* vs. *Scott*, 80 Conn. 317 (1907); *State* vs. *Pignone, supra*. To formulate a deprivation of due process around the use of a single word in a trial court's lengthy instructions seems hardly justifiable when the complete charge, viewed fairly, constitutes an accurate and careful statement of applicable state law.

CONCLUSION

For the reasons set forth herein it is respectfully urged that the petition for certiorari be denied.

Respectfully submitted,

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